

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

v

AUBREY BYRON WEBB,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

August 9, 2005

No. 248962

Saginaw Circuit Court

LC No. 02-022306-FH

Before: Cooper, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions of carrying a concealed weapon (CCW), MCL 750.227, and felon in possession of a firearm, MCL 750.224f. Defendant was acquitted of six counts of felonious assault, MCL 750.82, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of forty-seven months to seven years. After sentencing, the trial court held a *Ginther*¹ hearing and subsequently vacated defendant's conviction for CCW and scheduled defendant for resentencing on the felon in possession of a firearm conviction. Before defendant was resentenced, this Court entered a stay of the lower court proceedings. We now reverse the trial court's decision to vacate defendant's CCW conviction and to resentence defendant.

The prosecutor argues that the trial court erred in concluding that defendant's trial counsel was ineffective for failing to request a jury instruction on the business exception to the CCW statute. We agree. Whether defendant was denied effective assistance of counsel is a mixed question of fact and law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). "A judge must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). The trial court's findings of fact are reviewed for clear error and the constitutional determination is reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Although this Court defers to a trial

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

court's factual findings from the *Ginther* hearing, "we do not afford blind deference when the trial court applies the wrong legal standard." *Grant, supra* at 485 n 5.

The United States Supreme Court has set forth a two-part test to determine if a defendant's counsel was effective in a particular case. First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Second, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The relevant "inquiry is not whether a defendant's case might conceivably have been advanced by alternate means," but rather whether errors by his defense counsel were so great that they deprived the defendant of a fair trial. *LeBlanc, supra* at 582.

Pursuant to MCL 750.227(2), a person is prohibited from carrying a concealed weapon without a permit, "except in his or her dwelling house, place of business, or on other land possessed by the person." Defendant argued at the *Ginther* hearing that he was at his place of business with the weapon and, therefore, trial counsel should have requested a jury instruction on the "place of business" exception to MCL 750.227. However, defense counsel testified that he had a strategic reason for not requesting such instruction. Specifically, he explained that defendant had insisted from the beginning of the investigation that he did not have a gun at all on the day in issue. Defendant, in fact, testified at trial that he did not possess a gun on that day. Counsel explained that he felt that arguing inconsistent defenses on the CCW charge would hurt the remainder of defendant's case. We conclude that this strategy, although ultimately not successful on the CCW count, was reasonable. "[T]his Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843, (1999). Because defendant cannot show that his counsel's performance fell below an objective standard of reasonableness, he cannot meet the first prong of *Strickland*. Therefore, the trial court erred in vacating defendant's CCW conviction.

The prosecutor also argues that the trial court erred in ordering defendant to be resentenced after vacating his CCW conviction. As we are reinstating the conviction and sentence for the CCW charge, this argument need not be addressed. However, defendant argues that the sentencing guidelines prepared for both the CCW conviction and the possession of a firearm by a felon conviction were incorrectly scored. Specifically, defendant argues that offense variables (OVs) 1, 4, and 9 were improperly scored. Defendant preserved these objections by arguing them before the trial court at the motion for resentencing.² See MCL 769.34(10). This Court reviews the trial court's scoring of a sentencing variable for clear error. See *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003). "Scoring decisions under the sentencing guidelines are not clearly erroneous if 'there is *any* evidence in support' of the decision." *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

² The trial court reserved ruling on these objections until defendant was resentenced.

Defendant argues that because the OV's in question all involve victims and CCW and possession of a firearm are victimless crimes, the above-mentioned OV's do not apply and should not have been scored. Defendant is mistaken. Both CCW and felon in possession of a firearm are public safety crimes. MCL 777.16m. MCL 777.22(5) directs that OV's 1, 4, and 9 be scored when determining a defendant's guideline range for public safety crimes.³ If public safety crimes were victimless crimes, the statute would not direct the court to score the variables involving victims where applicable.

Additionally, although defendant was acquitted of the felonious assault charges, the trial court could still consider the underlying facts presented at trial. See *People v Parr*, 197 Mich App 41, 46; 494 NW2d 768 (1992). OV 1 was scored at ten points because there was evidence at trial that defendant pointed a gun directly at two people during the course of the incident from which this prosecution arises. MCL 777.31. OV 9 was scored at ten points because six people were present in the building at the time of the incident. MCL 777.39. The testimony supported that defendant placed all six of the witnesses in danger of injury. Additionally, one of the victims informed the probation department that she was in counseling because of the incident, which supports a scoring of OV 4 at ten points. MCL 777.34. Accordingly, we believe the record evidence supports the scoring of the challenged OV's.

Defendant also argues that under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), the trial court could not use information stemming from the felonious assaults, of which the jury acquitted defendant, to score the sentencing guidelines for CCW or possession of a firearm by a felon. This argument is without merit for several reasons. First, it is predicated on the erroneous assertion that the crimes for which defendant stands convicted are victimless crimes. Second, the jury's failure to convict of felonious assault and felony-firearm does not necessarily imply that the jury found that defendant did not point a gun at his victims, did not place them in danger of injury, and that one of the victims was not in need of counseling. Third, *Blakely* does not apply to indeterminate sentencing schemes. See *Blakely, supra* at 2540. Our Supreme Court in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), stated that *Blakely* does not affect Michigan's indeterminate sentencing scheme because the trial judge only sets the minimum sentence and does not have discretion over a defendant's maximum sentence.

Reversed and remanded for reinstatement of defendant's CCW conviction and sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra

³ MCL 777.22(5) also provides that OV's 3, 10, 12, 13, 14, 16, and 19 be scored. These OV's, however, are not at issue in this appeal.